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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
08/654,600	05/29/1996	RUSSELL F. MIZELL III	5383	7681

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MILES & STOCKBRIDGE, P.C.
1751 PINNACLE DRIVE
SUITE 500
MCLEAN, VA 22102-3833

EXAMINER

ROWAN, KURT C

ART UNIT	PAPER NUMBER
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3643

DATE MAILED: 05/16/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No. 08/654,600	Applicant(s) MIZELL
Examiner KURT ROWAN	Art Unit 3643

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.138 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) Responsive to communication(s) filed on Apr 2, 2002

2a) This action is FINAL. 2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

4) Claim(s) 2-13 is/are pending in the application.

4a) Of the above, claim(s) _____ is/are withdrawn from consideration.

5) Claim(s) _____ is/are allowed.

6) Claim(s) 2-13 is/are rejected.

7) Claim(s) _____ is/are objected to.

8) Claims _____ are subject to restriction and/or election requirement.

Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on _____ is/are a) accepted or b) objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11) The proposed drawing correction filed on _____ is: a) approved b) disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.

12) The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13) Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) All b) Some* c) None of:
1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. _____.
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

*See the attached detailed Office action for a list of the certified copies not received.

14) Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).
a) The translation of the foreign language provisional application has been received.

15) Acknowledgement is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) Notice of References Cited (PTO-892) 4) Interview Summary (PTO-413) Paper No(s). _____

2) Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) Notice of Informal Patent Application (PTO-152)

3) Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____ 6) Other: _____

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DETAILED ACTION

Claim Rejections - 35 USC § 112

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claims 2-13 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

3. Claim 13 recites the limitation "said chained surface" in line 17 on page 2. There is insufficient antecedent basis for this limitation in the claim. Also, "said top portion..." on line 16 of page two is confusing since it appears to refer to the receptacle, but from line 7 of page 2, the top portion refers to the top of the base. "Said portion" on line 11 of page 2 refers to a receptacle. Is this the same portion referred to above ?

Claim Rejections - 35 USC § 103

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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5. Claims 13, 2-12 are rejected under 35 U.S.C. 103(a) as being unpatentable over W.L.

Tedders and W.B.Wood: A Trap for Monitoring Pecan Weevils. (Tedders hereinafter).

The article by Tedders discloses an apparatus for capturing target species insects. Tedders discloses a first and second fins which are disposed in vertical planes. The fins extend radially outward from a common longitudinal axis defined by a line of intersection of the vertical planes. The fins are wider at a base portion and narrower at a top portion. Tedders shows a surface of the first and second fins defining opposing channel surfaces with portions that are directly exposed to the environment and target species. The channels narrow toward the top portion. The exposed portions may be seen by members of the target species. Tedders discloses that the base is painted brown or white which is a color which reflects light having a wavelength which attracts the target species. Tedders discloses a top portion comprising a 2 liter cylindrical plastic container and a screen funnel nestled into and fixed to the mouth of the plastic container to form the trap. Hence the channels formed by the first and second fins terminates within the receptacle. In reference to claim 13, Tedders shows all of the elements recited with the possible exception of the receptacle being open only at the entrance opening. Tedders does not disclose this but probably is open only at the entrance opening to any meaningful extent, but at any rate, it would have been obvious to have employ a receptacle open only at the entrance opening (which would preclude a screen top for example) since the function is the same and no stated problem is solved. Tedders shows a screen funnel which would admit ambient exterior light into the interior of the chamber since light can pass through a screen. It should be pointed out that on page 7 of the

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specification, line 5, it is stated that the top portion is preferable screen-like. In reference to claims 3, 5 and 6, Tedders discloses 4 triangular fins that are right triangles joined at the longest side which is not the hypotenuse such that the shortest sides form the base of the bottom portion. In reference to claims 4, Tedders does not disclose the angle of the fins opposite the longitudinal axis being between 60 and 80 degrees, but it would have been obvious to employ an angle of between 60-80 degrees since routine experimentation would determine to optimum angle. In reference to claims 7, 10, Tedders discloses reflectance rates for different colored bases such as white and brown. It would have been obvious to use routine experimentation to determine the optimum colors and the reflectance of these colors. See *In re Aller*, 105 USPQ 233, 235. In reference to claim 8, Tedders discloses a height of 122 cm for the height of the triangular pieces but the funnel would cover some of that. Hence it appears that the bottom would have a height of about less than 120 cm. At any rate it would have been obvious to employ to height of from between about 30-120 cm since routine experimentation would be used to determine the best trap size. In reference to claim 9, Tedders discloses the base contains means for anchoring the unit to the ground as two large gutter nails. In reference to claim 11, it appears that the top portion of Tedders admits ambient light into the interior of the chamber and onto a channel surface since a screen funnel and plastic cylinder are employed for a top portion. In reference to claim 12, Tedders discloses a screening (funnel) and a plastic container which are impervious to the passage of stinkbugs.

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Response to Arguments

6. Applicant's arguments filed April 2, 2002 have been fully considered but they are not persuasive. Applicant argues that the Tedders trap is for Pecan Weevils and the present invention is for stinkbugs. However, the type of insect trapped is not patentably limiting. The insects do not have to related in any way. Applicant has submitted no proof that the Tedders trap will not work for stinkbugs. In fact, the declaration filed April 2, 2002 shows that the Tedders trap works quite well for stinkbugs. As to the color, while Tedders found that a dark trap worked better to catch weevils, the white trap also caught weevils and on page 29, lines 7-15, Tedders states that many other types of insects besides pecan weevils were trapped in the study in both brown and white traps. This is evidence that the trap of Tedders could be used to trap stinkbugs. Applicant is incorrect in stating that the prior art reference itself must suggest the combination of elements. In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, the motivation is found in the Tedders reference since all the structural elements are found in the reference and Tedders also discloses that many other types of insects were caught in the trap. As to the plastic top, stating that one skilled in the art that "plastic top"

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is at least opaque is purely conjecture. Opaque means that light does not pass through. The plastic top of Tedders is probably two liter soft drink bottle which even if colored allow the passage of light. Hence the inventor of the present invention did not proceed "contrary to wisdom" but used the wisdom of the prior art in an obvious way. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). Therefor the examiner has made a Graham analysis and made out a prima facie case to find that the invention is obvious over the prior art to Tedders.

Response to Amendment

7. The declaration under 37 CFR 1.132 filed April 2, 2002 is insufficient to overcome the rejection of claims 2-13 based upon Tedders as set forth in the last Office action because: the showing is not commensurate in scope with the claims.

It refer(s) only to the system described in the above referenced application and not to the individual claims of the application. Thus, there is no showing that the objective evidence of nonobviousness is commensurate in scope with the claims. See MPEP § 716.

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In view of the foregoing, when all of the evidence is considered, the totality of the rebuttal evidence of nonobviousness fails to outweigh the evidence of obviousness.

Conclusion

8. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

9.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to **KURT ROWAN** whose telephone number is (703) 308-2321.

The examiner can normally be reached on Monday-Thursday

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from 6:30 a.m. to 5:00 p.m.

The fax phone number for the organization where this application or proceeding is assigned is (703) 306-4195 or (703) 305-3597.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1113.

Kurt Rowan

KURT ROWAN

PRIMARY EXAMINER

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May 15, 2002